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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 134

PAUL L. WILLITS, et al.,
Appellants,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee,

PHILADELPHIA ELECTRIC COMPANY,
Intervening Appellee

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

BRIEF OPPOSING MOTIONS TO DISMISS

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956. No. 1023.

Paul L. Willits, et al.,

Appellants,

v.

Pennsylvania Public Utility Commission,

Appellee,

Philadelphia Electric Company,

Intervening Appellee.

BRIEF OPPOSING MOTIONS TO DISMISS.

A. STATEMENT OF THE CASE.

Requirements of Rule 40 of the Supreme Court of the United States, such as statement of the case, questions presented for review are set forth in appellants Jurisdictional Statement and so are not repeated in this brief which is intended to reply to the arguments made by appellees in their Motion to Dismiss.

B. ARGUMENT.

The appellants oppose Motion to Dismiss of the Pennsylvania Public Utility Commission as follows:

Beginning with P. 2 of its Motion to Dismiss Appeal —the Pennsylvania Public Utility Commission endeavors

to convince the court that it has no duty to pass upon the issues raised by the appellant and the evidence submitted in support thereof by stating that the issuance of a certificate confers by the Pennsylvania Public Utility Commission a preliminary approval only. The language used, however, is just another way of saying that the final decision as to the right to and extent of an appropriation is for the court finally. With this there is no disagreement but that fact does not give the Pennsylvania Public Utility Commission the right to ignore the issues raised and evidence submitted otherwise the court cannot adequately determine the issues on review.

The Pennsylvania Public Utility Commission has a duty to inquire into the amount of land being appropriated and the necessity of the equipment being proposed because:

1. The Act of 1889 as amended by the Act of 1921, 15 P. S. 1182, sub-sections A and B imposes a duty of review by the Pennsylvania Public Utility Commission since that Act grants to the Utility the right to appropriate only that land which is necessary and the right to construct that equipment and the facilities which are necessary. Accordingly, the Pennsylvania Public Utility Commission must review the evidence to determine whether or not land appropriated and equipment proposed is necessary to accomplish the corporate purpose.

2. The Pennsylvania Constitution imposes a limitation upon eminent domain. Article 1, Section 10, provides that no private property shall be taken without authority of the law. It would require a review of the evidence by the Pennsylvania Public Utility Commission to determine whether or not the appropriation exceeded the limits permitted by the law.

3. The court's decisions require the Pennsylvania Public Utility Commission to consider and pass upon the

evidence. In *the case of Dickson, appellant* v. *P. S. C., 89 Pa. Superior Court 126, at page 134*, the court said:

> "We agree with the protestants that the land sought to be condemned must be necessary for the corporate use in transmitting electricity and that this necessity must be passed upon by the Commission before the power is exercised."

4. The Pennsylvania Public Utility Code imposed a duty of inquiry upon the Pennsylvania Public Utility Commission. The Act of 1937, May 23, P. L. 1053, Article 4, Section 413, 66 P. S. 1183, provides that the Commission shall determine and prescribe by regulation or order the reasonable, safe, adequate, sufficient service or facilities to be observed by the Utility.

5. The federal authorities require the Pennsylvania Public Utility Commission to evaluate the issues raised and the evidence submitted. The case of *Railroad Commission of California* v. *Pacific Gas and Electric Company, 302, U. S. 388, 58 S. Court 334*, states that "the Commission must act upon the evidence and not arbitrarily". And in the case of *N. L. R. B.* v. *Burns, 207 F. 2nd 434*, the court held that a refusal by the administrative body to receive and consider competent material evidence offered by a party to the proceeding amounts to a denial of due process of law.

6. If the Pennsylvania Public Utility Commission has no duty to consider the evidence and pass upon the issues then the Utility may appropriate land in any amount and without restriction. This concept is contrary to the principles laid down in the case of *Winger* v. *Aires, 371 Pa. 242*, which holds that no authority under the law is unlimited.

The appellants have not at any stage of the proceedings challenged the Philadelphia Electric Company's right to select its route and accordingly the authorities

beginning with the citation *Biddle* v. *P. S. C., 81 Pa. Superior Ct. 350,* are completely irrelevant. None of the cases cited provide that the Pennsylvania Public Utility Commission need not pass upon the issues or the evidence submitted.

As to arugment (A) P. 5 Pa. P. U. C. Motion to Dismiss.

The appellants have challenged the constitutionality of the Act of 1889 as amended by the Act of 1921, 15 P. S. 1181, and 1182 sub-sections A and B since it has permitted the taking of appellants' land without due process. The cases cited by the Pennsylvania Public Utility Commission—*Ferry* v. *King County, 141 U. S. 668 and Madison Traction Company* v. *St. Bernard Min. Co., 25 S. Ct. 251,* do not in either subject matter or language support the position of the Pennsylvania Public Utility Commission.

As to argument (B) P, 7 Pa. P. U. C. Motion to Dismiss.

The appellants submitted technical evidence, filed briefs and argued the matter before the Pennsylvania Public Utility Commission and the Superior Court but the evidence submitted and issues raised were not considered by the Pennsylvania Public Utility Commission nor was this failure to consider the issues and evidence corrected by the Superior Court and consequently the appellants had no hearing at all. *N. L. R. B.* v. *Burns, 207 F. 2nd 434.*

The appellants oppose Motion to Dismiss of the Philadelphia Electric Company as follows:

The Philadelphia Electric Company predicates its position on the cases of *Harding* v. *Illinois, 196 U. S. 78, 88; Capital City Dairy Co.* v. *Ohio, 183 U. S. 238; Herndon* v. *Georgia, 259 U. S. 441.* In the case of *Harding* v.

Illinois (supra), the appellant made some effort to raise the Federal question before the lower court but did not argue or raise the question before the appellate court and the court held that the appellants had waived its Federal right by implication.

In the case of *Capital City Dairy Co.* v. *Ohio (supra)*, the appellants did not specify the clause of the constitution relied on and further it did nothing to show that the attention of the State Court was directed to the question.

In *Herndon* v. *Georgia (supra)*, the Federal question was not presented in any form to the state appellate court and so the U. S. Supreme Court refused to consider the question.

However these cases have no application to the case at hand since every tribunal below has had an opportunity to pass upon the questions involved. On page 3 of Philadelphia Electric Company's Motion to Dismiss the issues raised before the Superior Courts of Pennsylvania by the appellants are set forth. Question 4 is chiefly the basis of this appeal. In argument before the Pennsylvania Public Utility Commission appellants argued that the Commission was required to pass upon the question of necessity for the amount of land to be appropriated and the necessity for the construction of the equipment proposed. The Philadelphia Electric Company argued that the issues were not relevant. When the Pennsylvania Public Utility Commission failed to pass upon the issues and consider the evidence the appellants set forth in their Petition for Appeal to the Superior Court this failure as one of their assignments of error. See Jurisdictional Statement, pp. 13 and 14.

In support of issue 4 (*supra*) the appellants argued that the Pennsylvania Public Utility Commission's failure to pass upon the evidence or consider the issues raised was a violation of due process as guaranteed by the fourteenth amendment of the United States Constitution (see Jurisdictional Statement. p. 14); so that the Superior

Court's attention was called directly to the Federal question. The Federal question was suggested by issue 4 (*supra*) in compliance with Pa. Superior Court Rule 34, which reads in part:

> "No point will be considered which is not set forth in the Statement of Questions Involved or *suggested thereby.*"

When the Superior Court failed or refused to correct the Pennsylvania Public Utility Commission's failure to consider the evidence or issues the appellants in its Petition for Appeal to the Supreme Court of Pennsylvania listed the court's failure as an assignment of error. This fact is set forth in Jurisdictional Statement on pages 11 and 12, but in view of the Philadelphia Electric Company's endeavor to minimize and distort the assignment made, it is repeated as follows (6 D and E must be read together):

> "6. Your petitioners assign as error the decree of the Superior Court affirming orders of the Pennsylvania Public Utility Commission for the following reasons:
>
> (*d*) That the Public Utility Commission failed to pass upon the question raised as to the necessity of the appropriation of the amount of land applied for nor did the Public Utility Commission pass upon the question of the necessity for the construction of the equipment proposed in violation of the duty imposed upon it by law. The Superior Court erroneously failed or refused to correct this failure on the part of the Public Utility Commission. Accordingly, the right to take the appellants' land has been granted and neither the Public Utility Commission nor the Superior Court has passed upon the necessity thereof nor the evidence adduced. This, therefore, amounts to the taking of appellants' land without due process

of law in violation of Article I section 9 of the Pennsylvania Constitution (due process clause of the Pennsylvania Constitution).

(e) Further, if the Act of 1921, (Act of 1889 as amended) 15 P. S. 1181 permits the taking of land in this manner then the Act is unconstitutional in that it *violates the 14th Amendment of the United States Constitution in that it would be a State Act which permits the taking of land without due process of law.*"

The case of *Live Oak Association* v. *Railroad Commission, 269 U. S. 354, 357-358* and the case of *Lynch* v. *New York ex rel. Pierson, 293 U. S. 52, 54* are not relevant to the issue at hand.

C. CONCLUSION.

For the foregoing reasons your honorable court is requested to find that the Federal questions sought to be reviewed were properly and timely raised; and, therefore, motions of the appellees should be dismissed.

Respectfully submitted,

BASIL C. CLARE,
Attorney for Appellants.